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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. [redacted]834

PAUL GINSBURG, Petitioner,

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO, and JOHN C. ARNOLD, individually and jointly as Justices of the Supreme Court of Pennsylvania, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paul Ginsburg, petitioner, respectfully prays that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Third Circuit to review its Judgment dated and entered January 3, 1958 (App. 2); and the Petition for Rehearing denied February 4, 1958.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania is reported in 148 F. Supp. 663, and appears in the Record (1b-7b). The opinion of the United States Court of Appeals for the Third Circuit is not yet reported, and is appended hereto (App. 1-2).

JURISDICTION

The judgment of the court of appeals sought to be reviewed was dated and entered January 3, 1958. The petition for rehearing was denied, without opinion, on February 4, 1958. Therefore, the time within which this petition for writ of certiorari might be filed expires on May 5, 1958.

The jurisdiction of this Honorable Court is invoked under Section 1254 of the Judicial Code.

QUESTIONS PRESENTED

1. In a civil action in federal court against members of the state judiciary acting in official capacity for their conspiratorial, discriminatory, illegal deprivations of a citizen's rights under the Constitution and laws of the United States, does not the Order granting the defendants' Motion to Dismiss the Complaint on the ground of judicial immunity conflict with applicable decisions of this Honorable Court?

2. Is not the defense of immunity an affirmative defense which is waived pursuant to Rule 12(h) of the federal Rules of Civil Procedure unless it is pleaded pursuant to Rule 8(c) of said Rules?

3. Are not the following rights guaranteed by the Constitution and laws of the United States, and are not citizens protected thereby from the conspiratorial, discriminatory, illegal deprivation thereof by members of the state judiciary acting in official capacity: the right to work in one's chosen business or profession, the right to earn a living in one's chosen business or profession, the right to protect and secure compensation earned for services rendered in one's chosen business or profession, the right to protect and enforce said rights in accordance with established forms of law and procedure and with due process of law, the right to a day in court, the right to be heard in advance of judgment, the right to establish and prove damages resulting from a conspiracy whereby one is injured in his personal and professional standing, the right to due process of law in securing and protecting one's property including his business and profession?

4. Has not the court of appeals so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the lower court, as to call for an exercise of this Honorable Court's power of supervision when the court of appeals has (A) sanctioned and permitted the district court's refusal to accept as true all allegations of the complaint and all inferences therefrom most strongly toward the plaintiff's case on a motion to dismiss; (B) without authority discriminatorily affirmed the order appealed from on a ground which was not properly before it; and (C) sanctioned and permitted the lower court's ignoring the plaintiff's right to discovery under Rule 26 (a) and plaintiff's Motion Under Rule 11 thereupon granting discriminatorily an unpleaded, waived and even non-

existent defense of immunity, particularly where the allowance of discovery and the Motion Under Rule 11 as required should result in summary judgmnt for the plaintiff?

CONSTITUTIONAL PROVISION INVOLVED

The provision of the Constitution of the United States involved herein is the Fourteenth Amendment, the pertinent portion of which is as follows:

> "Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

The statute involved is derived from Act of April 20, 1871, c. 22, sec. 1, 17 Stat. 13, sec. 1983 of Title 42 of the United States Code, now R. S. Section 1979, the pertinent portion of which is as follows:

> "*Civil Action for deprivation of rights.*
>
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

Petitioner, a Pittsburgh lawyer, who is a member in good standing of the Allegheny County, Pennsylvania State and American Bar Associations, lodged the instant Complaint (4a-12a) against the respondents who were then the Chief Justice and the Associate Justices of the Supreme Court of Pennsylvania. In the third paragraph it is alleged: "Jurisdiction is based upon the Fourteenth Amendment of the United States Constitution; the Civil Rights Acts now embodied in 42 U.S.C. secs. 1983, 1985 and 1986 (1954 Supp.); and an amount in excess of $3.000.00, exclusive of interest and costs" (4a). After the expiration of twenty days from the filing of the complaint, service upon the defendants of the Summons, the Complaint and plaintiff's Notice of Taking Depositions (12a) was made.

On behalf of the defendants were filed a Motion to Vacate Notice and to enter Order that Defendants' Depositions Be Not Taken (13a); a Motion to Strike Complaint (16a); and a Motion to Dismiss Under Rule 12 (18a); and simultaneously were filed on behalf on the plaintiff Answers (14a, 16a, 19a) to the three said motions which sought that they be stricken and suppressed as well as denied. Within a few days thereafter there was also filed on behalf of plaintiff a Motion Under Rule 11 (20a-23a), to require the prompt filing of written explanatory statements by Herbert B. Cohen, Esq. (then Attorney General of Pennsylvania) and Leonard M. Mendelson, Esq. (local associate counsel), attorneys for the defendants, as to what good grounds, if any, existed to support the reckless allegations contained in the defendants' three said motions, which allegations

are impertinent, irrelevant, scandalous, untrue and unprovable.

Hon. John W. McIlvaine declined to take appropriate action on any of the said motions before him in the district court. Instead, Judge McIlvaine entered the Order (23a) dismissing the Complaint for the reason that "the doctrine of judicial immunity from suits irrespective of the Civil Rights Act" is a complete defense to the instant action; and therefore concluded that, "It is the opinion of this Court that . . . the motion of defendants under Rule 12 to dismiss the plaintiff's action because the complaint fails to state a claim against the defendants upon which relief can be granted should be granted and the action should be dismissed" (5b).

It was plaintiff's position that the district court should preliminarily allow his Motion Under Rule 11 and his right to take depositions as guaranteed by Rule 26(a), particularly because the result should have been summary judgment for plaintiff; further that the defense of immunity was waived because of failure to plead it; and finally that the defense of immunity is not available herein.

Three Causes of Action are alleged in the Complaint. The first cause (4a-6a) is founded, inter alia, upon defendants' conspiratorial, discriminatory, illegal deprivation of plaintiff's right to earn a living and secure compensation earned for services rendered in his chosen profession, the right to protect and enforce the said right in accordance with established forms of law and procedure and with due process of law, the right to secure and protect his property including his business and profession. The second cause (7a-10a) is founded,

inter alia, upon defendants' conspiratorial, discriminatory, illegal deprivation of plaintiff's right to a day in court, his right to be heard in advance of judgment in order to establish and prove damages resulting from a conspiracy whereby he was injured in his property including his personal and professional standing and also 57,500 shares of stock or their market value of $172,500.00, his right to work and earn a living in his chosen business and profession, and his right to protect his said property rights in accordance with established forms of law and procedure with due process of law. The third cause (10a-12a) is founded, inter alia, upon defendants' conspiratorial, discriminatory, illegal deprivation of plaintiff's right to a day in court, his right to be heard in advance of judgment in order to establish and prove damages resulting from a conspiracy whereby he was injured in his property including his personal and professional standing and the concomitant real opportunity to secure and protect several millions of dollars of profits to (his client and) himself in his chosen business and profession, his right to protect and enforce said rights in accordance with established forms of law and procedure with due process of law.

Petitioner's decision to bring suit against the respondents was not made over night. It was a natural, inevitable and necessary result of a continuing conspiracy to discriminatorily deprive your petitioner of his rights, including but not limited to the ones complained of herein, which conspiracy began about fifteen years ago when your petitioner protested the entry of a patently illegal Injunction Decree (22a-[illegible]a) in the Court of Common Pleas of Allegheny County, Pennsylvania. That decree enjoined the institution of criminal prosecu-

tions on charges of libel and conspiracy, and it is the only such decree ever entered in Pennsylvania or throughout the common law of England. At the time when your petitioner prosecuted his early protests of that injunction decree, he was an elected officer of The Allegheny County Bar Association, which provoked the jurists involved all the more. The result was a pattern of treatment woven against your petitioner, whereby he would always be treated courteously and politely while every one of his cases was being thrown out of court on illegal technicalities, through misconstruing of facts and/or misapplying of procedural rules and applicable law. The condonation and adoption of this pattern by the Supreme Court of Pennsylvania was almost instantaneous. Subsequently, it was not much of a problem to infiltrate the pattern into the district court, whose similarly discriminatory decisions against your petitioner have always been condoned, affirmed and sanctioned by the court of "appeals". The records in cases of your petitioner support beyond question the foregoing statement. Had your petitioner not been deprived of his right to take depositions herein, the full and complete answers of the respondents should have of necessity admitted it. For instance, in a prior suit of your petitioner against Hon. Horace Stern, et al., Chief District Judge Wallace S. Gourley repeatedly stated for the official record that in his opinion (as in your petitioner's) the defendants' "action and procedure that followed was contrary to established rules and custom and was violative of basic concepts of justice". Yet he would not grant any relief to your petitioner because of his erroneous personal opinion on the law of immunity (4b). In both of two separate appeals in that suit, the

court of appeals each time (as in the instant appeal) "expressly refrained" from reaffirming its decisions on lack of immunity thus discriminatorily leaving the false impression on and off the record that your petitioner has been unwarrantedly suing Justices who are immune from suit, instead of the fact that he has discriminatorily and contrary to law been deprived of his valid causes of action against them. Furthermore, in the instant case, although District Judge McIlvaine is bound by the federal Rules of Civil Procedure as by an Act of Congress and your petitioner has a right therein, it is a matter of record that the jurist completely ignored every applicable rule, with complete and utter sanction by the Court of Appeals. Even worse, and typical of the pattern, Judge McIlvaine's Opinion (1b-7b) is judicially obnoxious beyond description not simply because it is insupportable and untenable in its entirety but actually because of the ill considered discussion therein of religion and politics. Of course, the said Opinion is simply another scandalous, defamatory coast-to-coast broadcast against your petitioner in violation of the Canons of Judicial Ethics.

The court of appeals, in line with the aforementioned discriminatory pattern, denied your petitioner's Motion to Remand, affirmed the Order of the district court, and then denied rehearing.

The foregoing statement actually constitutes a very small part of the intentional and purposeful discrimination against your petitioner which impelled him to the point of no alternative but to bring the instant action.

REASONS FOR ALLOWANCE OF THE WRIT

1. Members of the state judiciary acting in official capacity are not immune from civil actions in federal Courts for deprivation of citizens' rights under the Constitution and laws of the United States, particularly the Civil Rights Acts. Petitioner relied upon the ruling case on this subject in the Third Circuit, *Picking v. Pennsylvania R. Co.,* 151 F. 2d 240, rehearing denied 152 F. 2d 753 (C. A. 3rd, 1945), wherein Chief Judge Biggs held, p. 250, "The Statute must be deemed to include members of the state judiciary acting in official capacity", and "The result is of fateful portent to the judiciary of the several states". That case plainly states the applicable law, and it is respectfully submitted that a District Court Judge does not have the power to overrule the Court of Appeals for his Circuit, as was done by the order of the District Court herein. Furthermore, Chief Judge Biggs held that the sweeping and unqualified language of the Civil Rights Act explicitly applying to "any person" and "every person" must be deemed to include members of the state judiciary acting in official capacity; and any privilege conferred upon them by common law and/or state statutes was wiped out by Congress. The power to do so was vested in Congress; and the policy involved is for Congress and not for the courts.

In the case of *Tenney v. Brandhove,* 341 U. S. 367, 97 L. Ed. 1019 (1951), the United States Supreme Court upholds the law of the *Picking* case, although it is quite distinguishable from the instant case on the facts. It involved a privilege of state legislators which is based upon a different foundation than the immunity of judges

and is of a different type. However, that decision was expressly intended to apply only to the fact situation of that particular case. It held only that the Civil Rights statutes were not intended to make legislators personally liable for damages to a witness injured by a committee exercising legislative power. This result is reached by reference to the long standing tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities. The privilege of the legislators was not held to be absolute and the court indicated that under other circumstances the decision would be different. In effect this decision of the Supreme Court upholds the law of the *Picking* case.

Mr. Justice Black, concurring, pp. 379-81, made an observation which is most important to the instant case: "* * * it does not seem inappropriate to point out that the right of every person in this country to have his say, however unorthodox or unpopular he or his opinions may be, is guaranteed by the same constitutional amendment that protects the free press."

Mr. Justice Douglas, dissenting, held, pp. 381-3: "No other public official has complete immunity for his actions"; and "when a committee perverts its power, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends"; and "I see no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain".

District Judge McIlvaine's erroneous view of the law of lack of immunity and its applicability herein prob-

ably resulted from a bent of mind admittedly influenced by politics and personal friendship, as will become obvious to this Honorable Court when it reads his Opinion (1b-7b).

At this point petitioner repeats one of his arguments in the court of appeals, as follows: "It is bad enough that the defendants are above and beyond the reach of the law for their violations of the Pennsylvania Constitution. To give them the same immunity for their violations of the United States Constitution would be positively dangerous. How can the defendants consistently argue that they should be immune from suits for their violations of the United States Constitution, which they have previously sworn to uphold? Such suits would seem to be legally automatic, even without Civil Rights Acts."

The Picking case, *supra,* is cited with approval in *McShane v. Moldovan, et al.,* 172 F 2d 1016 (1949) 6 CCA. Therein the district court's dismissal for failure to state a cause of action was reversed and the cause remanded for trial. The court of appeals reaffirmed the point that the provision in the Civil Rights statutes for civil actions, as in the instant case, must be construed as *in pari materia* with the statute making such conduct a criminal offense. In that case it was held (p. 1020) that "The statute does not come into play merely because the federal law or the state law under which the officer purports to act is violated. It is applicable when and only when some one is deprived of a federal right by that action. The fact that it is also a violation of state law does not make it any the less a federal offense punishable as such. Nor does its punishment by federal

authority encroach on state authority or relieve the state from its responsibility for punishing state offenses. Screws v. United States, 325 U.S. at page 108, 655 S. Ct. at page 1038, 89 L.Ed. 1495, 162 A.L.R. 1330." The court continued (p. 1021): "However, the view of Mr. Justice Douglas, speaking for the majority of the court in the Screws case, is now the controlling law. In its holding in the Screws case, the Supreme Court reaffirmed its decision in United States v. Classic, et al., 313 U.S. 299, 61 S. Ct. 1031, 85 L.Ed. 1368," wherein this Honorable Court, in reversing the lower court, said: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with tne authority of state law, is action taken 'under color of' state law. 313 U.S. at page 326, 61 S.Ct. at page 1043, 85 L.Ed. 1368."

In the case of *Cooper v. Hutchinson,* 184 F 2d 119 (1950), the court of appeals in a unanimous opinion by Goodrich, J. (p. 122) cited with approval the cases of *Picking, supra,* and *Valle v. Stengel,* (1949) 176 F 2d 697, in both of which cases the Opinion was by Chief Judge Biggs. Nevertheless the same court of appeals, in referring to the issue of immunity in the instant case (and for the third time), stated (App. 2): "We desire to make it clear in this opinion that we are in nowise passing on this issue, attempted to be presented by Ginsburg, and we express no opinion as to whether the principle enunciated by us in Picking was in effect overruled by Tenney v. Brandhove, 341 U.S. 367 (1951)." The repeated refusal of the court of appeals to pass on that issue has not only been discriminatorily injurious to your petitioner, but it has caused undue confusion in

the judiciary. District Courts throughout the United States have interpreted the Third Circuit's indecision set forth above as a decision that Tenney has overruled Picking. Thus District Judge McIlvaine was enabled preliminarily to dismiss "legally" a complaint against some of his "close personal friends" (5b).

2. The defense of immunity is an affirmative defense, and the respondents have waived it pursuant to Rule 12(h) because of their failure to plead it pursuant to Rule 8(c). The pertinent portion of Rule 8(c) is as follows: *"Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively . . . and any other matter constituting an avoidance or affirmative defense." The pertinent portion of Rule 12(h) is as follows: *"Waiver of Defenses.* A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply . . ." Counsel for the respondents has been the Attorney General of Pennsylvania, Hon. Herbert B. Cohen originally who was succeeded by Hon. Thomas D. McBride. Accordingly, your petitioner made the following argument in his brief in the court of appeals:

> "The most interesting authority in support hereof, observed by your appellant, is the case of Van Sant v. American Express Co., 169 F.2d 355; because the Honorable Thomas D. McBride, Attorney General of Pennsylvania, who is counsel for the appellees herein, was counsel for the appellant therein before this Honorable Court, McLaughlin, O'Connell and Gourley, JJ. In that case (1948) the Honorable Thomas D. McBride succeeded in ad-

vocating the correct construction on this point and this Honorable Court held, of course, that the Statute of Limitations being an affirmative defense must be pleaded pursuant to Rule 8(c) or else it is waived pursuant to Rule 12(h), and then is not allowable subsequently by amendment. Hence no further authority need be cited on this point."

Needless to say, the court of appeals made no mention of the foregoing point in its Opinion.

Furthermore, your petitioner made the following argument in the court of appeals which is self-explanatory:

> "Because nothing of record indicates that defendants are in need of protection by guardian because of mental or physical incompetence, minority or senility, or any other reason, the lower court was powerless sua sponte to grant them nunc pro tunc the defense of immunity not pleaded and therefore waived, to 'protect' the defendants from their liabilities imposed by law."

3. The numerous rights of which your petitioner was deprived by the respondents, as set forth in his three causes of action, and enumerated in the Statement herein, are all guaranteed by the Constitution and laws of the United States. In *Carroll v. Local No. 269 I.B.E.W.* (1943), 31 A2d 223, (133 N.J. Eq. 144), the Court stated (pp. 224-5): "It is not inappropriate, however, to remark that the right to earn a livelihood is a property right which is guaranteed in our country by the fifth and fourteenth amendments of the federal constitution . . .". In *Lasdon v. Hallihan* (1941), 36

N.E.2d 227 (377 Ill. 187), the Court stated (p. 231): "The right to follow the professions is one of the fundamental rights of citizenship. A person's business, profession or occupation is property within the meaning of the constitutional provision as to due process of law and is also included in the right to liberty and the pursuit of happiness. People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A.L.R. 703. The right to pursue a lawful calling, business or profession, cannot be arbitrarily taken away . . .". In *Wilson, Inc., v. F. C. C.* (1948), 170 F.2d 793 (83 U.S. App. D. C. 176), the Court stated (p. 798): "A broadcasting license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury. We set forth in the margin quotations from decisions of the Supreme Court which support these statements . . .". In *Sorensen v. Jacobson* (1951), 232 P.2d 332 (125 Mont. 148, 26 A.L.R. 2d 1186), the Court stated (p. 336): "Under the due process provision, no citizen shall arbitrarily be deprived of his property. This the executive, legislative, or the courts cannot do or authorize to be done. Due process of law extends to every case which may deprive a citizen of property. It requires an orderly proceeding adapted to the nature of the case and in accordance with law, in which the person has an opportunity before the taking to be heard, and to defend, protect and enforce his rights. Before the property of a person can be taken by another and converted to his own use, a hearing or opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this". In *Bomar v. Keyes, et al.*, C.C.A. N.Y. (1947), 162 F2d 136, certiorari denied 68 S. Ct. 16, 332 U.S. 825, 92 L.Ed. 400, rehearing denied 68 S. Ct. 266, 332 U.S. 845, 92 L.Ed. 416, an action under

the Civil Rights Act to recover damages for the deprivation of one of the privileges secured by the laws of the United States, a judgment of summary dismissal was reversed and the cause remanded for trial. In the opinion by L. Hand, Circuit judge, it was held (p. 139) that the plaintiff's absence for service on a federal jury, a privilege, was the ground of her discharge as a school teacher, and the Court stated: "Nevertheless, it may have been the termination of an expectancy of continued employment, and that is an injury to an interest which the law will protect against invasion by acts themselves unlawful, such as the denial of a federal privilege".

The court of appeals and the district court are presumed to know the foregoing authorities and that they support the point that the deprivations of which your petitioner complained in his three causes of action were of rights under the Constitution and laws of the United States; that in federal practice we have Notice Pleadings; that Rule 8 governing General Rules of Pleading, Section (a) on Claims for Relief, provides: "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends, unless the Court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded"; and that, therefore, when it was acknowledged by the court of appeals in the opening paragraph of its opinion (App. 1) that "Ginsburg,

the appellant, filed a complaint against the then Chief Justice of the Supreme Court of Pennsylvania and against certain Associate Justices of that Court alleging that they had conspired to deprive him and had deprived him of rights guaranteed him by the Fourteenth Amendment to the Constitution of the United States in violation of the Civil Rights Acts now embodied in Sections 1983, 1985 and 1986, Title 42, U.S.C.A., thereby damaging him in excess of $3,000", the court of appeals knew that your petitioner had fully complied with Rule 8(a), (1), (2), and (3), and that his Complaint sufficiently stated a claim upon which relief can be granted. Thus it is patently incredible that the lower courts did not understand that a motion to dismiss the Complaint could not be granted legally. It is evident from the court of appeal's Opinion in the case of *Cooper v. Hutchinson* (1950), 184 F 2d 119, as well as its Opinion in *Valle v. Stengel* (1949), 176 F 2d 697, 701, that it knows the allegations of the Complaint must be taken as true and all inferences therefrom most favorably to the plaintiff's case, on a motion to dismiss. This should have left the lower courts no alternative but to deny the instant motion to dismiss. In the Cooper v. Hutchinson case, the lower court in its Opinion, 88 F. Supp. 774, 780 stated: "The 'due process of law' which the Fourteenth Amendment exacts from the States is a conception of fundamental justice (citing authorities). It is not satisfied by merely formal procedural correctness. . . ." That too was a Civil Rights action wherein a motion to dismiss was granted, but was vacated on other grounds in the Third Circuit, wherein the Opinion by Circuit Judge Goodrich contained an important paragraph rela-

tive to one sentence in the Opinion (App. 2) in the instant case.

After the court of appeals inserted its self-serving view of petitioner's three causes of action (in three short sentences), an obvious misconstruction, it volunteered the following sentence: "Ginsburg did not seek review of the judgments of the Pennsylvania State Courts, including the Supreme Court of Pennsylvania, by the Supreme Court of the United States". In the event that this constituted a hint that your petitioner did not, but should have exhausted all State remedies, then we have another point on which your petitioner finds support from the same court of appeals in another case. In said case of Cooper v. Hutchinson, Circuit Judge Goodrich stated (p. 124): "But appellants say that their right to assert a claim under Section 1 of the Civil Rights Act of 1871 is not dependent upon the prior pursuit of relief under state law. That is correct. Lane v. Wilson, 1939, 307 U.S. 268, 274-275, 59 S. Ct. 872, 83 L.Ed. 1281. We are not here governed by the rule of the habeas corpus cases to the effect that the state law processes must be exhausted before there can be resort to a federal court."

In the case of *Bottone v. Lindsley,* C. A. Colo. 1948, 170 F 2d 705, certiorari denied 69 S. Ct. 810, 336 U. S. 944, 93 L. Ed. 1101, the Court stated: "It is conceivable that persons, either individually or acting in concert might so use the state judicial process as to deprive a person of his property without due process of law, or to equal protection of the laws, yet we are certain that to make out a cause of action under the Civil Rights Statutes, the state court proceedings must have been a

complete nullity, with a purpose to deprive a person of his property without due process of law." Your petitioner's Complaint even meets this stringent test, because it is a matter of record that the state court proceedings upon which petitioner's three causes of action are based, were actually a nullity.

In opposition to the naive Opinion of District Judge McIlvaine, your petitioner respectfully submits a realistic Opinion of this Honorable Court. In the case of *United States v. United Mine Workers,* 330 U. S. 258, Mr. Justice Frankfurter stated in his Opinion (p. 310) that in such cases these respondents would not be acting as a court. They "would be a pretender to, not a wielder of, judicial power"; and Mr. Justice Rutledge stated in his Opinion (p. 343), "No man or group is above the law, nor is any beyond its protection. In re Yamashita, 327 U. S. 1, dissenting opinion, 41. These truths apply equally to the Government. When its power is exerted against the citizen or another in the nation's courts, those tribunals stand not as partisans, but as independent and impartial arbiters to see that the balance between power and right is held even. In discharging that high function the courts themselves, like the parties, are subject to the law's majestic limitations. We are not free to decide this case, or any, otherwise than as in conscience we are enabled to see what the law commands."

4. It is respectfully submitted that the court of appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the district court, as to call for an exercise of this Honorable Court's power of super-

vision because the court of appeals has (A) sanctioned and permitted the district court's refusal to accept as true all allegations of the Complaint and all inferences therefrom most strongly toward the plaintiff's case on the motion to dismiss, in conflict with its own decisions and applicable decisions of this Honorable Court; (B) without authority discriminatorily affirmed the Order appealed from on a ground which was not properly before it; and (C) sanctioned and permitted the district court's ignoring the plaintiff's right to discovery (12a) under Rule 26 (a) and plaintiff's Motion Under Rule 11 (20a-23a) (thereupon granting discriminatorily an unpleaded, waived and even non-existent defense of immunity), the allowance of which as required should have resulted in summary judgment for your petitioner. In support of this proposition (C), it is sufficient to point out that the Judge is bound by the federal Rules of Civil Procedure as by an Act of Congress, leaving no alternative but to grant the rights under the Rules to your petitioner. In support of proposition (A), it is elementary. In support of proposition (B), petitioner submits that because the district court did not give any consideration to the sufficiency of the comlaint aside from assuming "immunity", the court of appeals was *powerless* to do so under the law. It is not the function of the appellate court to assume the powers of the lower court. The Circuit Court of Appeals is an "appellate court" with the limited function of considering and rectifying errors of the trial court. *Ralston-Purina Co. v. Novak,* C. C. A. Neb. 1940, 111 F. 2d 631, held that the Circuit Court of Appeals is a court of appellate jurisdiction, and its functions are limited to review of alleged specific erroneous rulings of the

lower court. *Stephenson v. Equitable Life Assur. Soc. of U. S.*, C. C. A. Va. 1937, 97 F2d 406. held that the powers of Circuit Courts of Appeals are solely those of an appellate court, and the court can pass on the merits of a cause only by way of review In *Publicity Building Realty Corp., et al., v. Hannegan, e. al.*, 139 F2d 583, the court held (p. 586), "This court has repeatedly said that a motion to dismiss a complaint should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim"; and (p. 587), "An attempt by this court to rule upon these issues of law, which have not been tried below, and which require the assumption of a factual situation as favorable to the appellants as can reasonably be conceived in view of their pleadings, would not be justified".

CONCLUSION

It is respectfully suggested that the consequence of a decision even technically sustaining the respondents' position would necessarily be to flaunt the strong mandate of this Honorable Court upholding the civil rights of individuals as guaranteed by the Constitution and laws of the United States. Even to the point of dispatching military forces, our federal government has seen fit to enforce this mandate of the highest court in the land in the recent case of our sister State, Arkansas. In that case the highest State Administrative Officer, the Governor, was summarily brushed aside to enforce the civil rights of nine individuals.

In the Sovereign State of Lousiana, in the case of *Ludley v. Board of Supervisors of L.S.U.*, 150 F. Supp.

900, U. S. District Judge J. Skelly Wright struck down two legislative enactments of the Louisiana Legislature in preventing official discrimination by state law against individuals protected by said mandate of our Supreme Court.

Thus it has been made crystal clear that our highest judicial tribunal will not permit State agencies to officially deprive American citizens of civil rights protected by federal law. Can it be possible by any distortion of logic or by weakness in enforcement that the Supreme Court of the United States would permit State judicial officers to do that which a Legislature and a Governor are forbidden to do? It is conceivable that should this Court establish precedent therefor by decision favorable to the respondents herein, a less free and impartial judiciary would be afforded a new avenue of contempt for the rights of American citizens.

Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,165

PAUL GINSBURG, *Appellant*,

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO, and JOHN C. ARNOLD, Individually and Jointly As Justices of the Supreme Court of Pennsylvania

Appeal from the United States District Court for the Western District of Pennsylvania

Argued October 8, 1957

Before BIGGS, *Chief Judge*, and MARIS and McLAUGHLIN, *Circuit Judges*

OPINION OF THE COURT

(Filed January 3, 1958)

PER CURIAM.

Ginsburg, the appellant, filed a complaint against the then Chief Justice of the Supreme Court of Pennsylvania and against certain Associate Justices of that Court alleging that they had conspired to deprive him and had deprived him of rights guaranteed him by the Fourteenth Amendment to the Constitution of the United States in violation of the Civil Rights Acts now embodied in Sections 1983, 1985 and 1986, Title 42, U.S.C.A., thereby damaging him in excess of $3,000.

Three causes of action are set out in the complaint which need not be detailed here. It is sufficient to state that all of them are based on alleged improper and erroneous interpretations of the law of Pennsylvania and of Pennsylvania procedure and practice by lower

courts of the Commonwealth of Pennsylvania in determining unfavorably to Ginsburg causes of action which he sought to maintain against certain defendants. Ginsburg further alleges that the Supreme Court of Pennsylvania quashed his appeals and also denied certain procedural relief to which he thought he was entitled. Ginsburg did not seek review of the judgments of the Pennsylvania State courts, including the Supreme Court of Pennsylvania, by the Supreme Court of the United States.

It appears affirmatively from the complaint itself that Ginsburg has not brought himself within the reach of the Civil Rights Acts or any of them. The complaint does not show that he has been denied any rights, privileges or immunities secured by the Constitution and the laws of the United States. It is clear that Ginsburg has not alleged facts that demonstrate that those whom he names as defendants have denied or attempted to deny him equal protection of the laws. We find it unnecessary therefore to determine the issue as to whether the Third Civil Rights Act of April 20, 1871, 17 Stat. 13, now R.S. Section 1979, abrogated the common law immunity of the Judiciary of the Commonwealth of Pennsylvania as we held in Picking v. Pennsylvania R. Co., 151 F. 2d 240 (1945). We desire to make it clear in this opinion that we are in nowise passing on this issue attempted to be presented by Ginsburg, and we express no opinion as to whether the principle enunciated by us in Picking was in effect overruled by Tenney v. Brandhove, 341 U. S. 367 (1951).

The judgment of the court below will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.